Novartis Nutrition Corporation *and* Robert G. Tresemer, an Individual and Teamsters Local Union 120, a/w International Brotherhood of Teamsters, AFL–CIO. Cases 18–CA–15042, 18–CA–15094

August 28, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On August 4, 1999, Administrative Law Judge Jerry M. Hermele issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as further discussed below, and to adopt the recommended Order as modified.

1. On July 16, 1998,[2] Supervisor Mark Tagatz told prounion employee Steve Taray to confine his union activity to nonwork time. Tagatz further stated that Taray's "[job] performance there at Novartis was an issue" and that he wanted to see improvement.

The judge found that Tagatz's restriction on union activity was overly broad and therefore unlawful. In addition, the judge found that Tagatz's remark that Taray's performance was an issue violated Section 8(a)(1) because it reasonably tended to interfere with Taray's Section 7 rights.

We find it unnecessary to pass on Tagatz's restriction on union activity because finding that restriction unlawful would be cumulative and would not affect the Order.[3] We agree with the judge, however, that the Respondent violated Section 8(a)(1) by linking its comment about Taray's work performance with its restriction on his union activity.

In particular, we rely on the fact that Tagatz singled out Taray to speak to him about his union activity and simultaneously mentioned that Taray's work performance was a concern. There is no evidence in the record that the Respondent had expressed any problems with Taray's job performance prior to Taray's solicitation of union authorization cards. In these circumstances, we find that Tagatz's comment would reasonably be perceived by Taray as warning him about his job performance because he engaged in union activity.[4] Accordingly, we conclude that the Respondent's statement linking Taray's union activity with the Respondent's concern about his work performance interfered with Taray's statutory rights in violation of Section 8(a)(1) of the Act.[5]

2. The judge found that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Robert Tresemer for engaging in union activity. For the following reasons, we agree with the judge.

In July, the Union commenced an effort to organize employees at the Respondent's facility. Tresemer, a 10-year employee, was an open union supporter who solicited signatures for union authorization cards and openly criticized management at anti-union meetings. Tresemer worked as an operation technician, the highest nonsupervisory job at the plant. His work duties included performing all jobs in the Aseptics Department, such as mixing products, operating the aseptic filling machines and the packaging equipment, operating the Unitherm 1 and 2 machines,[6] and filling in for employees when they were absent.

On October 15 Tresemer was assigned to run the Unitherm 2 machine. At two separate times, 1:14 and 1:44 p.m., Tresemer indicated on the sterilizer log sheet that he performed checks for steam and wrote "ok" that the "steam seals [were] functioning."[7] At no time was Tresemer aware that the steam was not turned on and that there was no steam present. At 2:15 p.m., when the Unitherm was ready to process the product, Tresemer wrote "N/A" on the logsheet for "surge steam block."[8] At 2:45 p.m., the lack of steam was detected by the next operator, Dan Moran, who indicated that there was no steam present on the surge manifold. Within hours of the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates are in 1998, unless stated otherwise.

[3] We agree with the judge that the Respondent violated Sec. 8(a)(1) by its restrictions on the union activity of employees Lonny Hellerud, Robert Tresemer, and Wendy Skarolid.

[4] See *NLRB v. Okun Bros. Shoe Store*, 825 F.2d 102, 105 (6th Cir 1987), cert. denied 485 U.S. 935 (1988). (In determining whether an employer has violated Sec. 8(a)(1), "the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact upon the employees.")

[5] In his decision, the judge characterized Tagatz's comment as a "threat" and found that the Respondent violated the Act by threatening employees for engaging in protected concerted activity. As stated above, we find that the remark constituted a warning rather than a threat. Therefore, we shall modify the recommended Order to conform to the violation found.

[6] The Unitherm is used to achieve a sterile condition in the manufacture of nutritional beverage products. The Unitherm operator responsible for running the machines performs two basic functions: (1) bringing the Unitherm from an unsterile to a sterile state; and (2) monitoring the machines at one-half hour intervals to ensure that all parameters for sterilization are being met. The operator also is required to make various written entries to verify the sterilization process.

[7] A steam sweep check requires an employee to perform a visual verification that steam is emitting from 10 locations on the "surge manifold" section of the Unitherm which is about one foot above the floor.

[8] This notation was not appropriate because steam was either present or it was not.

incident, a reviewer of Tresemer's log sheet noticed the irregularities and notified management.

On October 16, Supervisor Lehnertz met with Tresemer to discuss the October 15 incident, which resulted in $2500 worth of product loss. During the meeting, Tresemer admitted that he was in a hurry and failed to inspect each of the 10 steam sweeps as required at the specified times, but said that he observed steam emitting from the base of the machine and assumed everything was operating properly.[9] After the meeting, Lehnertz discussed the incident with Supervisor Anderson and they both agreed that Tresemer should be discharged for intentionally falsifying records. They then met with Personnel Supervisor Tracy Roberts who agreed with their recommendation. On October 23, the Respondent issued a letter to Tresemer terminating him for falsification of company records for documenting steam flow when, in fact, steam was not present.

In *Wright Line*,[10] the Board set forth its test of causation for cases alleging violations of Section 8(a)(3) of the Act. First, the General Counsel must adduce sufficient evidence to support the inference that the protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Here, the judge properly found that the General Counsel established that Tresemer's protected conduct was a motivating factor in the Respondent's decision. The evidence showed that Tresemer's union activity was well known to the Respondent, as demonstrated by Supervisor Anderson's unlawful remark to Tresemer that Tresemer could not get union cards signed on company time, including break time. The evidence also showed that at the Respondent's anti-union meeting in August, Tresemer vocally criticized Supervisors Tagatz, Anderson, and Terry Lehnertz for mismanagement and employee favoritism. Further, the Respondent kept notes on Tresemer's work performance and conduct from August 1 until October 20. The Respondent failed to present evidence that it engaged in similar note taking on other employees' work performance and conduct.

In addition, the unlawful termination occurred against the background of other unfair labor practices showing that the Respondent bore animus towards prounion employees. Besides Anderson's illegal restriction on Tresemer's union activities, Anderson also discriminatorily prohibited employee Wendy Skarolid from talking about the Union while working, in violation of Section 8(a)(1) of the Act. Similarly, Supervisor Tagatz told employee Hellerud that there could be no union activity during lunch or break time. Also, the Respondent violated Section 8(a)(1) of the Act by issuing a warning to employee Taray because he engaged in union activity, and by promising and granting benefits to employees during the Union's organizing campaign to discourage them from engaging in union activities. For these reasons, we agree with the judge that the General Counsel has met his burden of establishing that Tresemer's union activity was a motivating factor in the Respondent's decision to discharge him.

We also find that the Respondent failed to meet its burden of establishing that the discharge would have occurred absent Tresemer's protected activity. As found by the judge, the Respondent's contention that Tresemer was discharged for intentionally falsifying company records lacks evidentiary support. The record shows that prior to the October 15 incident, Tresemer twice failed to make steam checks on the Unitherm 2 machine at the required time intervals and to record the checks on the log sheet, on July 31 and on August 10, respectively. In each situation, Anderson characterized Tresemer's conduct as mistakes that did not require discipline.

Indeed, the Respondent knew that Tresemer was not fully proficient in the proper operation of the Unitherm 2 machine and, on October 1, granted him 14 days of additional training. For example, although the preferred method was for the Unitherm operator to use scissors or a pen to verify the presence of steam from each steam sweep, Tresemer was trained years earlier to perform a visual inspection of the surge manifold to confirm that steam was emitting from the Unitherm, a practice followed by other employees as well.[11] Tresemer's uncontroverted testimony reveals that he had received only about 1 day of additional training at the time of his discharge. Thus, Tresemer was discharged before he had received the training on the Unitherm 2 machine that the Respondent itself had recognized that he needed.

The record evidence also establishes that the Respondent's discharge of Tresemer constituted disparate treatment. As set forth below, the record is replete with examples of similar mistakes and errors that occurred in the Aseptic Department for which the Respondent issued less severe disciplinary actions to employees. It is well established that the "existence of disparate treatment for similar misconduct can support a finding of improper motive." *Yesterday's Children, Inc. v. NLRB*, 115 F.3d 36, 48–49 (1st Cir. 1997).

For example, on August 18, 1997, the Respondent issued a written warning to employee Shawn Taylor for "[failing] to turn the steam back on to the homogenizing valves steam sweeps" after completion of maintenance on the Unitherm 1. Specifically, the warning stated that

[9] Employee Taray's uncontroverted testimony showed that some steam might leak from the bleeders even if the steam valve is off.

[10] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), affd., *Transportation Management Corp.*, 462 U.S. 383 (1983).

[11] Employee Hellerud testified, without contradiction, that it was the "current practice" for Unitherm operators merely to "look at" the steam sweeps rather than check each individual steam sweep.

Taylor ". . . missed the fact that there was no steam coming out of the sweeps. Over the next 2 hours [Taylor] performed four visual checks of the steam sweeps. [And,] on each check [Taylor] indicated that there was steam when in fact there was not." Even though the error was similar to Tresemer's mistake and resulted in a product loss of 1000 cases and 10 hours of filler downtime, Taylor was not suspended or discharged.[12]

In 1995 employee Hellerud received only a 1-day suspension for noting on the operator logs that there was visible steam flow on the Unitherm even though the steam sweep valve was off as detected by the quality control technician. Similarly, employee Mike Porter received just a written warning in 1994 for checking off that the "steam seals for the air incineration unit were operating at the sterilization of the system" when, in fact, there was no steam present.

In addition, the Respondent issued a warning and 3-day suspension to employee Kyle Ames on January 15, 1997, for failing to disconnect the CIP "crossover pipe" on the Unitherm which resulted in improper sterilization of the Unitherm and a $70,000 loss of production. Further, on March 7, 1997, the Respondent issued a memo to employee John Halverson regarding his failure to follow the electrolytic failure protocol when he found a "two way" electrolytic failure during routine testing. Halverson's error resulted in the potential loss of $24,869.70 and 2745 cases on hold. The Respondent informed Halverson that his discipline was dependent on the financial impact to the company of the product loss. In contrast, although Tresemer's error resulted in product loss of 252 cases equaling about $2500, Tresemer was immediately terminated.

Similarly, on April 2, the Respondent issued a 1-day suspension to employee Alan Kjenstad for making a series of mistakes that resulted in product loss worth $1920 and 7.5 hours of shutdown time on the Unitherm 1 machine. In addition, the Respondent issued a final warning to Bob Hartung on February 13 for two mixing errors that resulted in product loss of $1600. The final warning was issued based on the fact that Hartung had many errors in the past.

In sum, we find that the Respondent has failed to show by a preponderance of the evidence that Tresemer would have been discharged absent his union activity.[13] While the Respondent argues in its exceptions that Tresemer's conduct was more egregious than that of other employees and that there is no basis to compare the discipline received by other employees, the evidence shows that Tresemer's mistake was similar to the errors of other employees and that the action taken by the Respondent was inconsistent with its prior disciplinary practice.[14]

Accordingly, for all the above reasons, we agree with the judge that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Tresemer.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Novartis Nutrition Corp., Summit, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Warning employees about their work performance because they engaged in union activities."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[12] On January 30, Taylor also received a written warning for, inter alia, checking off "brik" and case codes as okay although the expiration date was incorrect and failing to dial up the homogenization pressure while processing the Resource Plus Strawberry product. There is no evidence in the record that Taylor was discharged for any of his errors.

[13] The Respondent relies on its discharge of 10 field salesmen for falsifying company records pertaining to customer visits, calls and orders. We find, however, that such misconduct is not comparable to that of Tresemer and the other Aseptic Department employees discussed above.

[14] The Board's decision in *Rockwell Automation/Dodge (Formerly Reliance Electric)*, 330 NLRB 547 (2000), is distinguishable. In that case, the Board found that the respondent did not violate Sec. 8(a)(3) and (1) of the Act by terminating Gregory Silvers for falsifying company records. The respondent lawfully discharged Silvers for fraudulently reporting that the rings he produced passed inspection when, in fact, a large number of the final products were bad. In its decision, the Board, inter alia, relied on the fact that the respondent demonstrated by a preponderance of the evidence that it reasonably believed that Silvers produced the bad rings and falsified the report form, and that the termination was consistent with its treatment of other employees who committed similar offenses.

By contrast, here, the Respondent failed to demonstrate that it reasonably believed that Tresemer intentionally falsified company records. Thus, the record shows that, consistent with the training he had received years earlier, Tresemer checked for the presence of steam at 1:14, 1:44, and 2:15 p.m., and actually observed steam at the base of the Unitherm. His entries in the steam log at 1:14 and 1:44 p.m. were consistent with his checks of the equipment. Regarding the third entry, the judge found that Tresemer's inappropriate notation of "N/A" in the log at 2:15 p.m. "called immediate attention to his log notations, thereby rebutting any inference that he intentionally falsified the log and hoped to conceal the falsification." In addition, when questioned by management, Tresemer readily and truthfully admitted not having checked each steam sweep individually.

Furthermore, unlike the situation in *Rockwell Automation*, and as discussed above, the Respondent's termination of Tresemer was not consistent with its treatment of other employees who committed similar offenses.

In sum, in this case, the record fully supports the judge's finding that the Respondent advanced the "intentional falsification" claim as a pretext to disguise its true motivation, which was to rid itself of a union activist.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT warn employees about their work performance because they engaged in union activities.

WE WILL NOT prohibit employees from engaging in these protected concerted activities, including soliciting union authorization cards, during lunch time or during breaks.

WE WILL NOT discriminatorily prohibit employees from talking about the Union while working.

WE WILL NOT promise to grant employees benefits or grant any such benefits in order to discourage employees from engaging in these protected concerted activities.

WE WILL NOT discharge our employees for engaging in these protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Tresemer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Tresemer whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge, and WE WILL, within 3 days thereafter, notify Robert Tresemer in writing that this has been done and that the discharge will not be used against him in any way.

NOVARTIS NUTRITION CORPORATION

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DECISION

I. STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge. In a March 23, 1999 complaint, the General Counsel alleges that the Respondent, Novartis Nutrition Corporation, violated Section 8(a)(1) of the National Labor Relations Act in the summer of 1998 by interfering with a union organizing campaign at its St. Louis Park, Minnesota facility. Specifically, it is alleged that management prohibited several employees from engaging in organizing activity. Also, management allegedly solicited grievances and promised benefits to employees in order to torpedo the organizing campaign. Finally, it is alleged that the Respondent violated Section 8(a)(1) and (3) of the Act by terminating prounion employee Robert Tresemer in October 1998.

This case was tried in Minneapolis, Minnesota on May 11 and 12, 1999, during which the General Counsel called seven witnesses and the Respondent called three witnesses. Then, on June 29, 1999, the General Counsel, the Union, and the Respondent filed written briefs.

II. FINDINGS OF FACT

Novartis Nutrition Corporation (Novartis),[1] based in Summit, New Jersey, manufactures food products at several locations in the United States, including St. Louis Park, Minnesota, a suburb of Minneapolis. These products include Ovaltine and liquid supplements which are used at hospitals and nursing homes (Tr. 19–20). During 1998, the Respondent purchased and received over $50,000 in interstate goods at the St. Louis Park plant, and sold over $50,000 in goods to out-of-state customers (GC Exh. 1(e)). David Hurley is the Respondent's President, David Egberg is a Vice-President, and Mark Tagatz, Terry Lehnertz, and John Anderson are supervisors at the plant (GC Exh. 1(e)); Tr. 11, 94, 303). Tracy Roberts is the personnel supervisor (Tr. 74).

In November 1997, the Respondent commenced an effort to survey its employees about various job-related matters. To that end, management sent a written questionnaire to all employees and later met with small groups of employees in April 1998. And on July 1, 1998, personnel supervisor Roberts wrote a memorandum to all employees listing several generalized goals gleaned from the survey results, such as "define and communicate career path opportunities within the company" (R. Exs. 9–17; Tr. 347, 385).

In July 1998, Teamsters Local Union 120, affiliated with the International Brotherhood of Teamsters, AFL–CIO (the Union), commenced an effort to organize the employees of the Novartis plant. Robert Tresemer, a 10-year employee, solicited signatures for union cards (Tr. 12, 209, 353). Supervisor Tagatz received complaints that some employees were being harassed into signing cards. So, on July 16, 1998, Tagatz told prounion employee Steve Taray to confine the union activity to "nonwork time." Tagatz also told Taray that his "performance there at Novartis was an issue" and that he wanted improvement. Also in July, Tagatz told prounion employee Lonny Hellerud that there could be no union activity during lunch or breaks because this was "paid company time." To be sure of his order, however, Tagatz later talked with Roberts who said that the employees could engage in union activity during lunch and breaks, and in the breakroom. But Tagatz never clarified his order to Hellerud (Tr. 21–23, 159–160, 174–175, 283–285). Also that summer, supervisor Anderson told prounion employee Wendy Skarolid not to talk about the Union while working. Previously, Skarolid could talk about anything during

[1] The Respondent's parent corporation, based in Bern, Switzerland, is in the pharmaceutical and chemical business (Tr. 18–19).

work (Tr. 149). Anderson also told Tresemer, in August, that he could not get union cards signed on company time, including breaks (Tr. 212).[2]

Also in July 1998, management held meetings with the employees to discuss "union organizing activity and other issues of concern" (GC Exh. 21; Tr. 146). Vice President Egberg stated that he was opposed to the plant being unionized, whereupon an antiunion film was shown to the employees. President Hurley then spoke, saying that "I cannot promise anything" but then proceeded to say that there would be new procedures to award jobs, a new personnel staff, and an evaluation to upgrade jobs (Tr. 172–174). Then, on August 5, Egberg wrote a memorandum to employees outlining specific "action" management would take on the issues raised in the meetings. The following specific reforms were implemented in August: tests would no longer be used to determine pay increases; paychecks would be given in advance of vacations; there were new "pay override" and job posting policies; a new employee relations staff member was hired; and there was a new policy to move employees to the 100% pay level (GC Exhs. 6, 14–17; Tr. 149, 156). And in September, there were reforms to the existing Pay Override and Attendance Policy, and the PTO Policy (GC Exhs. 19–20). No union election was ever held at the plant (Tr. 287).

As noted above, Tresemer was a veteran employee, holding the highest nonsupervisory job at the plant (Tr. 205, 213). He covered open shifts and trained new employees in his department (Tr. 99). Tresemer was also a vocal prounion employee. Indeed, at an August 1998 meeting held by management with employees to dissuade them from voting for the Union, Tresemer criticized supervisors Tagatz, Anderson, and Lehnertz for mismanagement and showing favoritism in their discipline of employees (Tr. 210–211).

On July 31, 1998, Tresemer failed to make two steam checks at the required time intervals and to record these checks on the written operating log for the Unitherm 2 machine, which sterilized a thick liquid product used by patients with swallowing problems (R. Exh. 7; Tr. 42–43, 176, 213). The "steam sweeps check" required a visual verification that steam was coming from the machine. New employees often made a lot of steam-related mistakes, including failing to detect when the steam was off. Each part of the machine emitting steam had to be checked. This was a very easy, yet important, task, sometimes performed with the use of scissors or a pen to verify the presence of steam which indicated that the sterilization process was underway. The Unitherm also had steam gauges but an operator was not to rely on the gauges alone because they were sometimes faulty. Tresemer did not rely upon scissors, pens or the gauges; rather he was trained to perform a visual inspection of the 10 locations on the "surge manifold" which was about one foot above the floor. The operator was then required to record his observations on a written log (R. Exh. 3; Tr. 38–39, 129, 134–138, 180–181, 222, 267–270). Employee Lonnie Hellerud testified, however, that "current practice" was for operators merely to "look at" the steam sweeps, rather than getting down to check each one (Tr. 163–164). Anderson did not discipline Tresemer, however, characterizing the July 31 error as a "mistake" (Tr. 312–313). Then on August 10 Tresemer again failed to make one required steam check on the same machine, but again Anderson characterized this as a mistake requiring no discipline (R. Exh. 8; Tr. 316–317). Because Tresemer was not fully proficient in operating the Unitherm 2, Anderson and Lehnertz suggested on October 1 that he needed more training (Tr. 102–103, 214, 217–218). So, Tresemer was granted 14 days of training (GC Exh. 23).

On Monday, October 15, Tresemer was again assigned to the Unitherm 2 (Tr. 219). His supervisor, Mike Porter, said that production was behind schedule (Tr. 220). Also, Tresemer had a headache that day but was under no medical work-related restriction (Tr. 227, 372). Unbeknownst to Tresemer, the steam was not turned on to the Unitherm in the early afternoon of October 15. Nevertheless, he performed three checks for steam, at 1:14, 1:44, and 2:15 p.m. So, at 1:14 and 1:44 p.m., while the Unitherm was starting up, Tresemer wrote "OK" on his log for "steam seals functioning." At 2:15 p.m., when the Unitherm was ready to process the product, he wrote "OK" and "N/A" on his log for "surge steam block." But at 2:45 p.m., the next operator, Dan Moran, wrote that the surge manifold was "off," indicating the lack of any steam (GC Exh. 8; Union Exh. 1; Tr. 33–34, 224, 383–384). Tresemer did not inspect each of the 10 steam sweeps as required at the three times. Rather, he saw steam at the base of the machine and assumed everything was operating properly (Tr. 220–221, 239, 326–327). He attributed his errors to stress he was under that day, his headache, and a lack of training (Tr. 226–227). The notation "N/A" was never appropriate because either there was steam present or not (Tr. 281). Likewise, it was improper to record "OK" merely because an operator observed steam in the vicinity of the sweeps (Tr. 204). When team leader Mona Garcia later told Tresemer that the steam had not been turned on yet, Tresemer was shocked (Tr. 226). As a result of his actions, $2500 worth of liquid product went through the Unitherm unsterilized (Tr. 35). This was a relatively small loss, however (Tr. 183).

Within hours, a reviewer of Tresemer's log report for October 15 noticed the following irregularities: the "N/A" at 2:15 p.m., and the lack of steam at 2:45 p.m. (GC Exh. 10, p. 35; R. Exh. 5; Tr. 44–45, 281–282). In accordance with Company procedure, the log was sent back to Tresemer for correction and he crossed out the "OK" at 2:15 p.m. (Tr. 61–63, 68, 383–384). Then, on Friday, October 16, Lehnertz met with Tresemer to discuss the October 15 incident. Tresemer admitted that he was in a hurry and failed to check the 10 individual steam sweeps, on three separate occasions. But he added that he saw steam coming from underneath and thought everything was operating well (Tr. 106–107). Indeed, it was possible for some steam to leak from the bleeders if the steam valve was off (Tr. 202). Lehnertz then discussed the matter with Anderson, who examined Tresemer's log entries and verified that the steam was indeed off that day. After meeting with Tresemer, Lehnertz and Anderson decided that Tresemer should be fired for falsifying records and they presented their recommendation to personnel supervisor Roberts (Tr. 319–328). Roberts and Tagatz agreed, but consulted with Vice President Egberg, President Hurley and a lawyer because they were concerned about possible labor law problems given Tresemer's past union activity (Tr. 273–275, 291–292, 362–366). According to Anderson, Tagatz, and Roberts, however, Tresemer's union activity played no role in the decision to terminate him (Tr. 275, 329, 374).

[2] Anderson was somewhat unsure about these conversations (Tr. 331–333). But Skarolid and Tresemer testified clearly about what Anderson said. And the Presiding Judge believes Skarolid and Tresemer.

On Tuesday, October 20, Tresemer met with Roberts, Tagatz, Lehnertz and Anderson. Tresemer said for the first time that he was bothered by a headache on October 15, and repeated that he was in a hurry that day, used no tools to verify the presence of steam, assumed everything was okay when he saw steam in the vicinity of the machine, and did not individually check the 10 sweeps, three times. Tresemer added that he did not realize the steam was off (Tr. 227–228, 248, 276, 370–371). In Tagatz' opinion, however, Tresemer's admissions constituted a falsification of records because "he had documented steam flow . . . when in fact it was impossible. . . ." (Tr. 34, 299). On Friday, October 23, Tresemer received a letter terminating his employment for "falsification of company records" (GC Exh. 7). That same day, Tresemer wrote a letter to President Hurley maintaining that he simply made a "mistake" and denying that he intentionally falsified records (R. Exh. 1).

According to Tagatz, terminations at Novartis were rare (Tr. 291). But Roberts approved the termination of between three and ten field salesmen for records falsification (Tr. 377–380).

On September 16, 1994, employee Mike Porter received a written warning for the following offense:

> On 9/9/94 you checked off that the steam seals for the air incineration unit were operating at the sterilization of the system, this in fact was not true. You had stated to Vern Fryer that he should open the valve for the steam seals and then you assumed that he had done that and that the steam would be there. This of course is a major mistake in the way we do business in the Aseptic department. People who have done this kind of thing in the past have been terminated. We feel that your excellent job performance and up front demeanor during this investigation is certainly worth some consideration of a lesser penalty. We take into account the fact that you were following behind Vern and you had told him to open those valves, nevertheless, you did sign your initials saying steam seals were okay after sterilization.

(GC Exh. 13). On December 19, 1995, employee Lonnie Hellerud received a one-day suspension for the following incident:

> On December 3, 1995 at 16:15 the QC lab technician found no visible steam flow through the remote homogenizing valve steam sweep. Further investigation found the steam sweep valve was turned off. This valve had been turned off during weekly maintenance five hours earlier. On your operator logs you incorrectly noted on 10 checks (5 hours) that there was visible steam flow through all the sweeps on the Unitherm. Although the flow through that sweep is light, it clearly your responsibility to make sure there is flow.

(GC Exh. 25, p. 1). Anderson characterized Hellerud's infraction as a "mistake" (Tr. 330–331). According to Hellerud, Novartis had a progressive discipline policy then, in which a verbal warning was followed by a written warning, suspension, and termination. But Hellerud added that this progressive discipline policy was eliminated "a couple of years ago" (Tr. 162). Finally, on August 18, 1997, employee Shawn Taylor received the following written warning:

> On July 13, 1997 you performed routine operator maintenance on the remote homogenizer for Unitherm #1. After completion of the maintenance you failed to turn the steam back onto the homogenizing valves steam sweeps. Further compounding this mistake was that you missed the fact that there was no steam coming out of the sweeps. Over the next two hours you performed four visual checks of the steam sweeps. On each check you indicated that there was stream when in fact there was not. Fortunately the operator at shift change noticed the steam sweep mistake immediately. The system was shutdown, CIP'd and resterilized to end the process deviation.

(GC Exh. 12, p. 15).

III. ANALYSIS

A. The 8(a)(1) Allegations

The General Counsel alleges that the Respondent illegally prohibited four employees from engaging in activity protected by Section 7 of the Act at the start of the union organizing campaign in July and August 1998. Specifically, it is alleged that two supervisors—Tagatz and Anderson—ordered the four employees to refrain from such activities as collecting signatures or talking about the Union during "paid company time."

Collecting signatures for authorization cards and talking about unions are generally protected activities. However, an employer can place restrictions upon such activities without running afoul of the Act. For example, an employer may limit activities not associated with work to the nonworking time of an employee, as long as union activities are not singled out. *Montgomery Ward,* 269 NLRB 598, 599 (1984). But any rule which purports to ban union activity completely during working hours will be presumed invalid because it is overly broad, tending to connote periods from the beginning of the workday to the end of the workday, including the employees' own time. *Our Way, Inc.,* 268 NLRB 394, 394–395 (1983). But a presumptively invalid rule can be saved by a company that can show a compelling and legitimate business reason necessitating the rule. *Midland Transportation Co.,* 304 NLRB 4, 5 (1991).

Employees Taray, Hellerud, and Tresemer were all engaged in activity protected by Section 7 of the Act during paid break times. And the Respondent's written policy was to prohibit "solicitation of employees" *except* during break times or lunch periods." (R. Exh. 18, p. 11). Nevertheless, supervisor Tagatz approached Taray and told him to confine his union activity to "non work time." Clearly, this prohibition was much too broad because it essentially prohibited union activity during all times on company premises. *Opryland Hotel*, 323 NLRB 723, 728 (1997). Making matters worse was Tagatz's simultaneous threat to Taray that his "performance" was "an issue." In the presiding judge's view, this remark reasonably tended to interfere with Taray's Section 7 rights, notwithstanding the fact that Tagatz never disciplined Taray. See *Rossmore House,* 269 NLRB 1176 (1984). Likewise, Tagatz's similar ban to Hellerud regarding breaktime union activity also violated the Act given that the Respondent has made no showing for the necessity of such a ban. Moreover, Tagatz failed to tell Hellerud about the correct rule even after learning about his incorrect initial order. See *Gaines Electric Co.,* 309 NLRB 1077 (1992); *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978). Lastly, supervisor Anderson's identical ban on Tresemer's breaktime protected activity also violated Section 8(a)(1).

Similar to rules governing onsite solicitation, an employer may not restrict discussions about unions at any time of the day when employees are free to discuss other subjects unrelated to work. *Willamette Industries*, 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co.,* 278 NLRB 402, 407 (1986). And that is exactly what Anderson did by ordering employee Skarolid not to talk about the Union while working. Moreover, the Respon-

dent showed no necessity at all for this rule. Finally, it does not matter that Skarolid apparently ignored Anderson's order. Thus, it is concluded that the Respondent's no-union-talking rule violated Section 8(a)(1) as well. Accordingly, the Respondent will be ordered to cease and desist from the aforementioned illegal actions and to post an appropriate remedial notice to its employees.

Turning to the matter of the Respondent's solicitation of grievances and promises to employees during the union effort, the General Counsel alleges that the Respondent did nothing about the employees' previously raised concerns until the organizing campaign got underway. But the Respondent counters that the minor benefits granted in the summer of 1998 were merely the result of management's long-standing efforts to ascertain employee concerns.

To be sure, where an employer already has a policy of soliciting employee grievances, "the employer may continue the practice during the organizing drive, but may not significantly alter its past manner and method of solicitation." *Clare Hospital,* 273 NLRB 1755 (1985). And once the union organizing drive has begun, an employer may not promise or grant benefits without giving rise to the inference that those actions were done in order to interfere with the rights of the employees. See *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409–410 (1964).

The evidence clearly shows that the Respondent surveyed and met with its employees beginning in late 1997—well before any whiff of union organizing activity—about job-related matters. Moreover, that conduct continued through the summer of 1998. Indeed, the General Counsel does not claim that higher management's meetings with the employees that summer constituted a significant change in the Respondent's manner of soliciting grievances. And the presiding judge does not think so either. So, it is concluded that the Respondent's solicitation of employees grievances did not violate the Act.

As for the Respondent's granting of a variety of modest nonwage changes in August and September 1998, it is necessary to examine the following factors to determine whether these actions were unlawful:

(1) the magnitude of the benefit;
(2) the number of employees receiving the benefit;
(3) how employees reasonably would view the purpose of the benefit; and
(4) the timing of the benefit.

See *B & D Plastics*, 302 NLRB 245 (1991). While the benefits here concerned relatively minor matters such as issuing paychecks before vacation and better job posting procedures, all of the employees apparently received them. And in the presiding judge's view, the Respondent has failed to connect a specific ascertained grievance with a specific granted benefit. Also, it is significant that when the benefits were granted, management already exhibited union animus with its illegal summer 1998 edicts regarding union talk and card signing, and antiunion meetings with the employees. Indeed, the timing of these benefits—smack in the middle of the organizing drive—and President Hurley's disingenuous statement to the employees that he "cannot promise anything" while simultaneously listing the reforms to be implemented, warrants the conclusion that the employees reasonably viewed the granting of these reforms as a quid pro quo to defeat the Union. Thus, "[i]t is immaterial that an employer professes that he cannot make any promises, if in fact he expressly or impliedly indicates that specific benefits will be granted." *Michigan Products,* 236 NLRB 1143, 1146 (1978). Finally, the Respondent has failed to proffer any independent business necessity for the granting of these benefits at these times. Compare *Williams Litho Service,* 260 NLRB 773 (1982) (absence of any evidence providing a causal connection between the Union effort and the conferred benefit). Therefore, it is concluded that the Respondent's granting of benefits during the organizing drive violated Section 8(a)(1) of the Act. Accordingly, the Respondent will be required to cease and desist this illegal practice.

B. Tresemer's Termination

The General Counsel alleges that Robert Tresemer was discharged in retaliation for his summer 1998 union activity; the Respondent counters that Tresemer's falsification of company records regarding the presence of sterilizing steam in the Unitherm machine on October 15, 1998 mandated his termination. In either event, the analysis of this issue is governed by the standards of *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); approved in *Transportation Management Corp.,* 462 U.S. 383 (1983). Thus, to prove its Section 8(a)(1) and (3) allegations regarding the Respondent's termination of Tresemer, the General Counsel must establish, by a preponderance of the evidence, that his protected union activity was a motivating factor in the Respondent's decision to terminate him. If so established, the burden then shifts to the Respondent to show, also by a preponderance of the evidence, that its action was based on a lawful reason and would have occurred absent the protected activity.

The presiding judge concludes that the General Counsel has met his *Wright Line* burden. Specifically, there is evidence aplenty of the Respondent's animus against the Union, from the illegal July and August 1998 no-solicitation orders from supervisors Tagatz and Anderson directed to various employees, including Tresemer, and the illegally timed August and September 1998 reforms implemented by President Hurley and Vice President Egberg. Thus, having establihed an illegal motive by a preponderance of the evidence, the burden now shifts to Novartis to prove that Tresemer actually falsified company documents and that he was appropriately disciplined.

On a thorough review of the evidence, the Presiding Judge rejects the Respondent's claim that Tresemer was properly fired for falsification of records. First, Tresemer's actions on October 15, 1998 amounted to nothing more than negligence, as opposed to intentional falsification. Indeed, it is unrebutted that Tresemer checked for the presence of steam at 1:14, 1:44, and 2:15 p.m. and actually observed steam at the base of the Unitherm; a practice followed by other employees as well. While the preferred method was for the operator to check all 10 individual steam sweeps for the presence of steam, using some tool, Tresemer readily admitted his sloppiness to management the next day. Further, Tresemer made the inappropriate notation "N/A" on the steam log for 2:15 p.m., for reasons unknown. By doing so, however, he called immediate attention to his log notations, thus rebutting any inference that he intentionally falsified the log and hoped to conceal the falsification. Second, contrary to the Respondent's argument, the timing of Tresemer's union activity and his termination was highly suspicious. Although Tresemer was not disciplined for what the Respondent characterized as two separate "mistakes" in checking for steam on July 31 and August 10, during the union effort,

Anderson illegally forbade Tresemer from soliciting union card signatures in August. Also in August, at a meeting of employees called by management, Tresemer criticized supervisors Tagatz, Anderson, and Lehnertz for mismanagement. And then, barely two months later, Lehnertz, Anderson, and Tagatz recommended that Tresemer be fired for the October 15 incident. Third, management's discipline of Tresemer, versus other employees who made almost identical errors in checking for steam, constituted classic disparate treatment of a prounion employee. Specifically, in 1994, 1995, and 1997, three other employees received written warnings or a one-day suspension for indicating the presence of steam when in fact there was no steam. In sum, Novartis' official reason for firing Tresemer was entirely pretextual. Therefore, it will be required to offer Tresemer reinstatement to his job, with appropriate backpay.

CONCLUSIONS OF LAW

1. The Respondent, Novartis Nutrition Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Teamsters Local Union 120, affiliated with International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Pursuant to paragraphs 5(a), 5(b), 5(c), 5(f), 5(g), and 7 of the General Counsel's complaint, the Respondent violated Section 8(a)(1) of the Act by prohibiting four employees, in July and August 1998, from engaging in protected concerted activity.

4. Pursuant to paragraphs 5(d), 5(e), and 7 of the complaint, the Respondent violated Section 8(a)(1) of the Act by promising benefits to employees in July and August 1998 and granting benefits to employees in August and September 1998, in order to discourage employees' union activities.

5. Pursuant to paragraphs 6 and 8 of the complaint, the Respondent violated Section 8(a)(1) and (3) of the Act by terminating employee Robert Tresemer on October 23, 1998.

6. The unfair labor practices of the Respondent, set forth in paragraphs 3, 4, and 5, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Accordingly, IT IS ORDERED that the Respondent, Novartis Nutrition Corporation, its officers, agents, successors, and assigns, shall:[3]

1. Cease and desist from

(a) Threatening employees in any manner for engaging in protected concerted activity.

(b) Ordering employees not to engage in protected concerted activity during lunch or break times.

(c) Singling out the Union as a prohibited topic of conversation at work.

(d) Promising to grant, or granting, employees benefits in order to discourage employees' union activity.

(e) Discharging any other employees for engaging in union activity.

(f) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following action

(a) Within 14 days of the date of this Order, offer Robert Tresemer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Robert Tresemer whole for any loss of pay and benefits he may have suffered by reason of his unlawful termination, to be computed as set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within three days thereafter notify Robert Tresemer in writing that it has done so and that it will not use the discharge against him, in any way.

(e) Within 14 days after service by the Region, post at its facilities in St. Louis Park, Minnesota, and all other places where notices customarily are posted copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."